STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)
(Jansen, P.J., and Meter and Beckering, JJ.)

CHANCE LOWERY,

Plaintiff-Appellee,

v

ENBRIDGE ENERGY, LIMITED PARTNERSHIP, and ENBRIDGE ENERGY PARTNERS, L.P.,

Defendants-Appellants. /

Supreme Court No. 151600

Court of Appeals No. 319199

Lower Court No. 11-3414-NO
(Calhoun County Circuit Court)

BRIEF OF AMICUS CURIAE MICHIGAN DEFENSE TRIAL COUNSEL IN SUPPORT OF DEFENDANTS-APPELLANTS, ENBRIDGE ENERGY, LIMITED PARTNERSHIP AND ENBRIDGE ENERGY PARTNERS, L.P.

PROOF OF SERVICE

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STATEMENT OF THE BASIS OF JURISDICTION

Amicus Curiae Michigan Defense Trial Counsel (MDTC) relies on the jurisdictional statement of Defendants-Appellants.

STATEMENT OF THE QUESTION INVOLVED

This Court directed the parties to address two questions, which are as follows:

(1) Whether the plaintiff in this toxic tort case sufficiently established causation to avoid summary disposition under MCR 2.116(C)(10);

(2) Whether the plaintiff was required to present expert witness testimony regarding general and specific causation.

Michigan Defense Trial Counsel will focus its discussion on the second question, which examines the general rule regarding expert testimony as it relates to causation in toxic tort cases. Michigan Defense Trial Counsel's answer to the second question is "yes."

STATEMENT OF INTEREST

Amicus curiae, Michigan Defense Trial Counsel (MDTC), is a statewide association of attorneys whose primary focus is the representation of defendants in civil proceedings. Established in 1979 to enhance and promote the civil defense bar, MDTC accomplishes this by facilitating discourse among and advancing the knowledge and skills of defense lawyers to improve the adversary system of justice in Michigan. MDTC appears before this Court as a representative of defense lawyers and their clients throughout Michigan, a significant portion of which are potentially affected by the issues involved in this case. MDTC has a strong interest in assuring a fair and balanced civil justice system, which it has pursued through its amicus program and other efforts. MDTC, through its members who are engaged in representing litigants in jury trials, has a depth of experience regarding the jury trial system, and what makes it function well and what makes it function poorly. Thus, this brief is filed as part of its effort to serve as a friend to the Court by offering the benefit of its perspective regarding the ways in which the outcome of this case can advance or impede the integrity and reliability of the jury system in Michigan for trials involving scientific and technical toxic tort claims.

STATEMENT OF FACTS

Michigan Defense Trial Counsel relies on the factual statement included in Defendants-Appellants brief on appeal.

ARGUMENT

Expert Testimony Is Necessary To Establish Both General And Specific Causation In A Toxic Tort Case

Justice Breyer recently observed that "[i]n the age of science, science should expect to find a warm welcome, perhaps a permanent home, in our courtrooms." He explained that this is so because:

> The legal disputes before us increasingly involve the principles and tools of science. Proper resolution of those disputes matters not just to the litigants, but also to the general public – those who live in our technologically complex society and whom the law must serve. Our decisions should reflect a proper scientific and technical understanding so that the law can respond to the needs of the public.

Breyer, *Introduction in Reference Manual on Scientific Evidence,* p 2 (2d ed., Federal Judicial Center 2000). And these scientific and technical matters represent an increasingly important part of civil litigation and jury trials. The issues are presented as part of the American legal system, which is committed to the adversary process and the jury trial as a means of resolving disputes. Unlike some continental systems in which the judges hire experts to advise the court or the parties agree on a single expert who acts for both sides, experts here are retained by each side and present their opinions during trial and subject to cross-examination.

The "central concept of the adversary process is that out of the sharp clash of proofs presented by advocates in a highly structured forensic setting is most likely to come the information from which a neutral and passive decision maker can resolve a litigated dispute in a manner that is acceptable both to the parties and to society." Tephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 Ohio St L J 713, 714 (1983). In the "ideal model of the adversarial system, impartial decision makers—

judge, jury, or some combination thereof—render decisions based on evidence presented by competent advocates zealously representing their clients' interests in accordance with established rules." Nathan M Crystal, *Limitations on Zealous Representation in an Adversarial System*, 32 Wake Forest L R 671, 674 (1997). Commentators recognize that "[e]laborate sets of rules to govern the pretrial and post-trial periods (rules of procedure), the trial itself (rules of evidence), and the behavior of counsel (rules of ethics) are all important to the adversary system." Lansdman, *supra* at 715.

To preserve the integrity of the process and assure that decisions are predicated on a sound and accurate consideration of complex scientific and technical information, the judiciary must carry out its obligation to assure that evidence based upon this kind of information be provided by a qualified expert, rather than presented based on unreliable junk science or lay speculation. Justice Breyer pointed out that "[a] decision wrongly denying compensation in a toxic substance case, for example, can not only deprive the plaintiff of warranted compensation but also discourage other similarly situated individuals from even trying to obtain compensation and encourage the continued use of a dangerous substance." But "a decision wrongly granting compensation, although of immediate benefit to the plaintiff, can improperly force abandonment of the substance." *Id*. at p 3. Requiring qualified experts to provide testimony on the scientific matters involved in the case can lead to a "law that reflects an understanding of the relevant underlying science, not for law that frees companies to cause serious harm or forces them to abandon the thousands of artificial substances on which modern life depends." *Id*. at p 4.

The rule of law in Michigan has long been that expert testimony is required when an element of a claim turns on issues that are outside the common knowledge of ordinary

jurors. *Krohn v Home-Owners Ins. Co*., 490 Mich 145, 167; 802 NW2d 281 (2011). As recognized in *Gilbert v DaimlerChrysler*, 470 Mich 749, 780-791(2004), *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579 (1993), and their progeny, a plaintiff must offer competent expert evidence in order to establish these technical and scientific matters. In *Gilbert*, this Court held that the testimony "must be rooted in 'recognized scientific, technical, or other specialized knowledge' and must assist the trier of fact." 470 Mich at 790. And where proffered testimony is "far beyond the scope of an individual's expertise," the testimony is inadmissible. 470 Mich at 789. The *Gilbert* court also recognized that appropriate expert testimony was particularly important to the integrity of the process in the area of causation. 470 Mich at 782("[c]areful vetting of all aspects of expert testimony is especially important when an expert provides testimony about causation"). Otherwise, "ostensibly legitimate data may serve as a Trojan horse that facilitates the surreptitious advance of junk science and spurious, unreliable opinions." 470 Mich at 782.

A. Toxic torts arise in a uniquely scientific and technical context

Toxic torts, such as the one that is the basis for Lowery's claim in this case, arise in a highly scientific and technical context. Toxic tort cases require a determination regarding whether something is a toxin, what kind of dosage or level of exposure is harmful, and whether the substance caused the specific plaintiff's injury. Unlike more traditional torts, toxic torts arise out of the claim that the plaintiff was injured due to exposure to an allegedly harmful toxin, often in circumstances in which the harmful substance is not visible to the naked eye.

Black's law dictionary defines "toxin" as "having the character or producing the effects of a poison; produced by or resulting from poison; poisonous." *Black's Law Dictionary* (8th ed., Bryan A. Garner, editor)(1999). The field of toxicology is the 'branch of medicine that concerns poisons, their effects, their recognition, their antidotes, and generally the diagnosis and therapeutics of poisoning; the science of poisons." *Id*. Toxic torts are predicated upon exposure to particles that travel through air or water or permeate or are embedded in soil. Whether a substance is a toxin at all, and if so, the level of exposure and length of time of exposure and intensity of exposure that will cause injury to humans is a highly scientific question.

Since toxic torts are predicated on the analysis of these questions, the fact-finder must analyze highly scientific and technical information. In an ordinary toxic tort case, such as this one, the plaintiff "alleges he has developed a disease because of exposure to a toxic substance negligently released by the defendant." *Henry v Dow Chemical Co*, 473 Mich 63, 67; 701 NW2d 684 (2005). See also e.g., *Barrett v Rhodia, Inc*, 606 F3d 975, 980-985 (8th Cir 2010) (applying Nebraska law); *Johnson v Arkema, Inc*, 685 F3d 452, 460-471 (5th Cir 2012) (applying Texas law). Claims like this rest on proofs that are quintessentially scientific and technical. Neither jurors nor lay witnesses would ordinarily possess the scientific background in toxicology and related fields of science to answer these questions on the basis of anything other than on the basis of speculation or conjecture.

B. Expert testimony should ordinarily be required to establish causation for claims based on alleged exposure to toxins

This Court has recognized that it "is the principal steward of Michigan's common law." *Henry*, 473 Mich at 83. As such, it has the opportunity and obligation to develop the common law as "circumstances and considerations of public policy have required." *Id*. But

its exercise of this responsibility is guided by prudential principles, including the desire to "avoid capricious departures from bedrock legal rules as such tectonic shifts might produce unforeseen and undesirable consequences." *Id*, citing *Sizemore v Smock*, 430 Mich 283, 307; 422 NW2d 666 (1988). One of the bedrock legal rules governing reliability of testimony to protect the jury's fact-finding process and the integrity of trials is that when testimony is offered on subjects that extend beyond what lay witnesses would know as a matter of common knowledge, the testimony is admissible only through a qualified expert. *Gilbert v DaimlerChrysler*, 470 Mich 749; 685 NW2d 391 (2004); *Daubert v Merrell Dow Pharmaceuticals, Inc,* 509 US 579 (1993). The purpose of creating these requirements, and making the court a gatekeeper, is to "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael*, 119 S Ct 1167, 1176 (1999). This is necessary to ensure that the scientific testimony or evidence is "gound[ed] in the methods and procedures of science." *Daubert*, at 590.

The failure to require proof by qualified experts will inevitably result in speculative causation that will undermine the integrity of the process. See e.g., *General Electric v Joiner*, 522 US 136 (1997) (testimony properly excluded because case-specific analysis demonstrated it was outside the range of reasonable experts where it extrapolated from studies without explaining how they could be used in the facts of this case). Michigan has a longstanding and firm rule against allowing a claim to be proved based on speculative causation. *Skinner v Square D Co*, 445 Mich 153; 516 NW2d 475 (1994) (explaining legal distinction between reasonable inference and impermissible conjecture). See also *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956); *Craig v Oakwood Hospital*,

471 Mich 67, 87-88; 684 NW2d 296 (2004). The plaintiff is obligated to show "more than a mere possibility or a plausible explanation." *Craig*, 471 Mich at 87.

Proof of causation in a toxic tort case "raises numerous complicated issues because the mechanisms that cause certain diseases and defects are not fully understood." Reference Manual, p 32. Even where they are known, proof of causation requires more than a plaintiff detailing an injury and explaining the chain of events that caused that injury. Even a cursory review of the facts of this case make clear why that is so. Here, the plaintiff himself initially told doctors that his symptoms were caused by antidepressant drugs or the Vicodin he took to relieve other symptoms. (Koziarski dep, pp 16-17, 22, App 58-59a; Bronson Hospital records, "8/20/10 Progress Notes," App 41a). He made no mention of the claimed exposure to volatile organic compounds (VOCs) as a result of an oil spill that occurred miles away. Weeks after the incident, and more than a week after even the smell had dispersed, the plaintiff insists that he suffered severe headaches, nausea, and vomiting leading to an injury to his gastric artery.

Unless a qualified expert speaks to both general and specific causation, the jury will be left to speculate on the connection between the oil spill and the symptoms, using only conjecture to make the jump from a remote dispersal of potentially toxic substances to the plaintiff's claimed injuries. Absent accurate scientific testimony on the causation issues, an adverse judgment could be squarely predicated on impermissible conjecture based on the symptoms occurring after the claimed exposure. The Fifth Circuit Court of Appeals rejected efforts to similarly state a claim on the basis of a physician's testimony supposedly eliminating other possible causes because it was "not an exercise in scientific logic but in the fallacy of post-hoc propter-hoc reasoning." *Black v Food Lion, Inc*, 171 F3d 308, 314 (5th

Cir 1999)(en banc), cert denied 119 S Ct 1454 (1999). Absent qualified experts who can analyze the temporal relationship, the strength of the association between the claimed toxin and the disease or injury, the dose-response relationship, a replication of findings, biological plausibility, consideration of alternative explanations, cessation of exposure, specificity of the association, and consistency with other knowledge, a judgment may be entered that is inconsistent with accurate scientific information.

Such a judgment will not only harm the parties to the litigation – either by depriving a plaintiff of compensation to which he was entitled or by foisting potentially huge costs onto a defendant for claimed injuries not caused by his product or conduct. When a judgment is wrongly imposed on a defendant on the basis of a logical fallacy rather than scientific knowledge and fact, both that defendant and the public are likely to suffer. Products can be removed from the market or activities curtailed as a result of adverse judgments. If the judgment is not based on scientifically accurate information, it may well result in taking a product off the market or restricting or limiting the activity, thus depriving the public of potentially beneficial economic activity and products that are essential to modern life. Since *Daubert* and *Gilbert,* both state and federal courts have served as gatekeepers to ensure that junk science is not the basis for the outcome of a jury trial. This role has been and will be increasingly important in our increasingly scientific and technical world. Confidence in the jury trial system depends on the courts continuing to play this role.

CONCLUSION AND RELIEF

Wherefore, Amicus Curiae Michigan Defense Trial Counsel respectfully requests this Court to adopt a rule holding that expert testimony is required to prove both general and specific causation in a toxic tort case.

Respectfully submitted,

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Dated: August 15, 2016

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